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8

9 **UNITED STATES BANKRUPTCY COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
SAN JOSE DIVISION

11 In re)	Case No. 22-50314 SLJ
12)	
13 HAWAIIAN RIVERBEND, LLC)	Chapter 11
14)	
15)	Hearing Date: June 7, 2022
)	Hearing Time: 2:00 p.m.
Debtor.)	Place: Tele/Videoconference
)	Judge: Honorable Stephen L. Johnson

16 **UNITED STATES TRUSTEE'S OBJECTION AND RESERVATION OF**
17 **RIGHTS WITH RESPECT TO THE APPLICATION TO EMPLOY THE LAW**
18 **OFFICES OF MICHAEL JAY BERGER**

19 Tracy Hope Davis, the United States Trustee for Region 17 ("United States Trustee"), by
20 and through her undersigned counsel, hereby files her *Objection and Reservation of Rights with*
21 *Respect to the Application of* Hawaiian Riverbend, LLC ("Debtor") *to Employ the Law Offices of*
22 *Michael Jay Berger* ("Proposed Counsel") filed on May 10, 2022, ECF No. 24 in the above-
23 captioned case ("Application").
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25 In support of her Objection, the United States Trustee represents the following:
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1 filed an amended voluntary petition, removing the Subchapter V classification, and proceeding as
2 a single asset real estate case. ECF No. 38. On the same day, the Debtor filed amended Schedules
3 E/F. ECF No. 39.

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5 To date, the Debtor has not filed an application designating a responsible individual. *See*
6 ECF Docket *generally*.

7 The initial 11 U.S.C. § 341(a) meeting of creditors in this case was held on May 17, 2022
8 and was adjourned to June 24, 2022. *See* ECF Docket *generally*.

9 The only assets reflected on the Debtor's Schedule A/B are: (i) two Bank of America
10 checking accounts with a combined value of \$250 and (ii) a vacant land located in Waikoloa
11 Village, Hawaii with a value of \$6 million. ECF No. 22.

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13 The Debtor scheduled two secured claims on Schedule D: (i) a \$540,000 claim held by the
14 Kai Family Trust and (ii) a \$150,000 claim held by "Hawaii County Tax." *Id.* The Debtor's
15 amended Schedule E/F lists fourteen general unsecured claims that amount to \$380,622.70 in total
16 claims, including: (i) a \$120,000 claim for legal fees held by David Dorenfield; (ii) a \$70,000
17 claim held by Phil Hayes for a loan; and (iii) a \$12,000 claim held by William Miroyan for a loan.
18 ECF No. 39.

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20 The Debtor's Statement of Financial Affairs is largely void of any information about the
21 Debtor's financial dealings leading up to the bankruptcy filing, other than to list the Firm's \$21,738
22 pre-petition retainer received from Mr. Miroyan, who holds a 100% ownership interest in the
23 Debtor, and an individual named Harold Barker. ECF No. 22.

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1 **B. The Employment Application & Motion to Withdraw**

2 On May 10, 2022, the Employment Application accompanied by Mr. Berger's declaration
3 was filed. ECF No. 24. On the same date, Proposed Counsel filed a motion to withdraw as counsel,
4 citing a breakdown of relationship as the reason for withdrawal. ECF No. 28.

5 The Debtor's signature does not appear on the Application. *Id.* Proposed Counsel indicates
6 that Mr. Miroyan "refused to sign the declaration in support of the Application." ECF No. 24, at
7 p. 16 of 32. In addition, the Application provides Mr. Miroyan has been uncooperative and
8 incommunicative. *Id.* The Application is also missing a proposed order. ECF No. 24.

9 The Application discloses that Proposed Counsel also represents Mr. Miroyan in a personal
10 Chapter 13 case, also filed in the Northern District of California (Case No. 22-50339).² *Id.* In
11 addition, the Application discloses that Mr. Miroyan paid Proposed Counsel's retainer of \$10,000
12 and the remaining \$11,738 was paid by Mr. Barker. *Id.* These retainer payments were described
13 as a gift. ECF No. 24 at 4.

14 In response to the Application, creditors Kenneth Y. Kai and Tae K. Kai, Trustees of the
15 Kai Family 1998 Trust ("Creditors") filed an objection to the Application, stating that the
16 employment of Proposed Counsel will not benefit the estate due to the Debtor allegedly not
17 cooperating with Proposed Counsel. ECF No. 34. Further, the Creditors also argue that Proposed
18 Counsel is not disinterested because the firm represents both the Debtor and Mr. Miroyan. *Id.*

19 On May 31, 2022, Proposed Counsel filed a reply to Creditors' objection arguing, among
20 other things, that the employment of the firm benefited the estate, and that Proposed Counsel is
21 not disinterested because neither the Debtor nor Mr. Miroyan have interests materially adverse to

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23 ²Proposed Counsel also filed a motion to withdraw in Mr. Miroyan's personal Chapter 13 case on May 10, 2022,
24 which is scheduled to be heard on June 9, 2022. *See* ECF No. 14, Case No. 22-50339.

1 each other. ECF No. 41. Proposed Counsel notes it is agreeable to refund the retainer paid in
2 connection with Mr. Miroyan's chapter 13 case. *Id.*

3 4 **III. AUTHORITIES & DISCISSION**

5 **A. The Application Should Be Denied Because Debtor has failed to satisfy their burden** 6 **under the Federal and Local Bankruptcy Rules**

7 A request for relief such as that made in the Employment Application should be made only
8 under a specific statute, Fed. R. Bankr. P., and/or local rule and "shall state with particularity the
9 grounds therefor...and set forth the relief or order sought." Fed. R. Bankr. P. 9013.

10 Here, the Application fails to include any specific legal authority to support the relief that
11 is being requested, leaving the Court, the United States Trustee, creditors, and parties in interest to
12 guess which statutes and/or rules the Debtor is proceeding under. *See* ECF No. 24 *generally*. The
13 Application should not be approved for this reason alone.

14 Although no statutory authority pertaining to professional employment is cited in the
15 Application, as indicated, if the relief requested is based upon section 327(a), the Application
16 should also be denied on procedural and substantive grounds as set forth below.

17 18 19 **1. Procedural Defects Preclude Approval of the Application**

20 Bankruptcy Local Rule 5005-2(a) provides in part that: "[a] document electronically filed
21 with the Court shall bear the typed name of the person purporting to have signed the document and
22 shall be deemed to be signed by the person . . ." Bankruptcy Local Rule 5005-2(a).

23 Because the Debtor has not signed the Application, there is no evidence that the Debtor
24 expressly authorized the filing of the Application. *See* B.L.R. 5005-2(a). In fact, the declaration in
25 support of the Application provides that the Debtor's principal refuses to sign the Application.
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1 ECF No. 24, at p. 16 of 32; *see also In re Veluz*, 2015 WL 161002, at *4 (Bankr. D.N.J. Jan. 9,
2 2015) (“[w]hen documents requiring the debtor’s original signature are not signed by the debtor,
3 the evidentiary basis for the information in those documents no longer exists.”). Under the
4 circumstances, the Application is procedurally defective and should not be approved.
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6 **2. Substantive Defects Preclude Approval of the Application**

7 Bankruptcy Code section 327(a) requires that professional persons seeking authorization
8 to represent the bankruptcy estate be disinterested and prohibits such professionals from
9 representing any interest adverse to the estate. *See* 11 U.S.C. § 327(a). The same standards that
10 apply to trustees for the retention of professionals also apply to debtors-in-possession. 11 U.S.C.
11 § 1107(a); *Staiano v. Pillowtex, Inc. (In re Pillowtex, Inc.)*, 304 F.3d 246, 251 (3d Cir. 2002).
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13 Even a potential conflict provides sufficient grounds for a court to decline to appoint an
14 attorney. *In re AFI Holding, Inc.*, 530 F.3d 832, 838 (9th Cir. 2008) (potential for materially
15 adverse effect sufficient grounds to deny appointment); *Chugach Elec. Ass’n v. United States*
16 *District Court*, 370 F.2d 441, 442-43 (9th Cir. 1966). In fact, doubt as to whether a particular set
17 of facts gives rise to a disqualifying conflict of interest should normally be resolved in favor of
18 disqualification. *In re Wheatfield Business Park LLC*, 286 B.R. 412, 418 (Bankr. C.D. Cal. 2002).
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20 Further, when a third party pays a debtor’s attorney’s retainer, the Court can take the
21 restrictive or analytical approaches in evaluating the proposed employment.
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23 The restrictive approach is discussed in *In re Hathaway Ranch Partnership*, 116 Bankr.
24 208 (Bankr. C.D. Cal. 1990).”

25 The Hathaway Court explained that:
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1 Third parties do not transfer property or funds to an attorney to
2 represent a debtor in possession unless that representation is in the
3 best interest of the third party. It is often the case that the interests
4 of the third party are not identical to the interests of the debtor in
5 possession in its role as fiduciary of the bankruptcy estate. Thus
6 by accepting payment from a third party, the proposed counsel for
7 the debtor in possession necessarily has a conflict of interest in that
8 counsel is serving two masters -- the one who paid counsel and the
9 one counsel is paid to represent. I find that this is an actual conflict
10 of interest that disqualifies a professional from being employed
11 pursuant to 11 U.S.C. § 327 absent a showing that the interests of
12 the third party and the bankruptcy estate are identical upon notice
13 to all creditors, equity security holders and other parties in interest.

14 *In re Hathaway Ranch Partnership*, 116 B.R. 208, 219 (Bankr. C.D. Cal. 1990) (emphasis added).

15 The analytical approach rejects a *per se* approach and instead reviews the issue on a case-
16 by-case basis. Courts using the analytical approach use a 5-part test in determining whether
17 counsel can be employed when counsel's retainer was paid by principal or insider of the Debtor.
18 These factors include: (1) the arrangement must be fully disclosed to the debtor/client and the third
19 party payor/insider; (2) the debtor must expressly consent to the arrangement; (3) the third party
20 payor/insider must retain independent legal counsel and must understand that the attorney's duty
21 of undivided loyalty is owed exclusively to the debtor/client; (4) the factual and legal relationship
22 between the third party payor/insider, the debtor, the respective attorneys, and their contractual
23 arrangement concerning the fees, must be fully disclosed to the Court at the outset of the debtor's
24 bankruptcy representation; and (5) the debtor's attorney/applicant must demonstrate and represent
25 to the Court's satisfaction the absence of facts which would otherwise create non-disinterestedness,
26 actual conflict, or impermissible potential for a conflict of interest. *In re Lotus Props. LP*, 200 B.R.
27 388, 392 (Bankr. C.D. Cal. Sept. 16, 1996) (citing *In re Kelton*, 109 Bankr. 641 (Bankr. D. Vt.
28 1989) (the "Kelton Factors").

1 i. **The Application should be denied due to Proposed Counsel failure to**
2 **provide sufficient evidence to allow the Court to assess the relationship**
3 **between the Debtor, Proposed Counsel, Mr. Miroyan, and Mr. Barker.**

4 In this case, neither the Application nor the accompanying declaration address the
5 *Hathaway Ranch Partnership* factors (restrictive approach) or the *Lotus/Kelton* factors (analytical
6 approach). Rather, the declaration accompanying the Application provides, without further
7 elaboration, that Mr. Miroyan “signed the retainer agreement but refused to sign the declaration in
8 support of [the Application].” ECF No. 24, at p. 16.

9 Under the restrictive approach, the Debtor has failed to show that the interests of the
10 Debtor, Mr. Miroyan, and Mr. Barker are identical. Proposed Counsel’s reply to the Creditors’
11 objection only states that “[n]either the Debtor, nor [Mr.] Miroyan, have interests materially
12 adverse of each other or their respective estates, and neither are creditors of each other.” ECF No.
13 41. What about Mr. Barker? This mere allegation is not supported by any evidence as required by
14 the Bankruptcy Local Rules. *See* BLR 9013-1(d). Therefore, absent sworn affidavits/declarations
15 from Mr. Miroyan and Mr. Barker, specifying in detail their connections with the Debtor and how
16 their interests and the Debtor’s interest are identical, the Application should be denied.

17 The Debtor has also failed to satisfy its burden under the analytical approach. Specifically,
18 the third *Lotus/Kelton* factor states that the “third party payor/insider must retain independent legal
19 counsel and must understand that the attorney's duty of undivided loyalty is owed exclusively to
20 the debtor/client.” It does not appear that either Mr. Miroyan or Mr. Barker have retained
21 independent legal counsel; in fact, Proposed Counsel represents Mr. Miroyan in his personal
22 Chapter 13 case. Further, unlike in *In re Lotus Props*, the Application and the attorney-client fee
23 agreement fail to include pertinent language that Mr. Miroyan and Mr. Barker understand and
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1 agree that Proposed Counsel will owe its sole legal duty to the Debtor and will act solely in the
2 interest of the Debtor regardless of whether such action is in the best interest of Mr. Miroyan and
3 Mr. Barker. *See* ECF No. 24 *generally*. Further, the Application fails to explain who would pay
4 Proposed Counsel's fee should the existing retainer balance be depleted, and whether subsequent
5 payments would be loans or gifts to the Debtor. *Id.*

7 Given the several deficiencies identified above, the Application should be denied.

8 **ii. The Application should be denied for failure to make adequate**
9 **disclosures pursuant to Rule 2014**

10 The Ninth Circuit applies the disclosure requirements of FRBP 2014 "strictly." *Neben &*
11 *Starrett, Inc. v. Chartwell Financial Corp. (In re Park-Helena Corp.)*, 63 F.3d 877, 881 (9th Cir.
12 1995). "[T]he disclosure rules are not discretionary." *Mehdipour v. Marcus & Millichap (In re*
13 *Mehdipour)*, 202 B.R. 474, 480 (9th Cir. BAP 1996); *see also In re Tevis*, 347 B.R. 679, 693-94
14 (9th Cir. BAP 2006).

16 Under FRBP 2014(a), proper disclosure is necessary to enable the court to make an
17 informed decision as to whether the applicant meets the statutory requirements for employment
18 under Section 327(a), i.e., that such person does not "hold or represent an adverse interest to the
19 estate" and is a "disinterested person." 11 U.S.C. § 327(a); *Park-Helena Corp.* at 881. "All facts
20 that may be pertinent to a court's determination of whether an attorney is disinterested or holds an
21 adverse interest to the estate must be disclosed." *Id.* at 882 (quoting *In re Hathaway Ranch*
22 *Partnership*, 116 B.R. 208, 219 (Bankr. C.D. Cal. 1990). "The duty of professionals is to disclose
23 all connections with the debtor, debtor-in-possession, insiders, creditors, and parties in interest. . .
24 . They cannot pick and choose which connections are irrelevant or trivial No matter how old
25 the connection, no matter how trivial it appears, the professional seeking employment must
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disclose it.” *Park-Helena Corp.*, 63 F.3d at 882 (quoting *In re EWC, Inc.*, 138 B.R. 276, 280-281 (Bankr. W.D. Okla. 1992)).

Failure to disclose is alone a sufficient basis for denying a professional’s employment. *See In re Film Ventures Int’l, Inc.*, 75 B.R. 250, 252 (B.A.P. 9th Cir. 1987); *In re Lee*, 94 B.R. 172, 177 (Bankr. C.D. Cal. 1988) (citing *Diamond Lumber, Inc. v. Unsecured Creditor’s Comm.*, 88 B.R. 773, 777 (N.D.Tex.1988).

As stated above, the Application should be denied until the Debtor, Proposed Counsel, Mr. Miroyan, and Mr. Barker disclose all legal and factual connections between Mr. Miroyan and Mr. Barker and their companies, Debtor and its insiders and Proposed Counsel, including all monies paid by Mr. Miroyan and Mr. Barker to Proposed Counsel in connection with this case, what the genesis of those funds are, and whether the payments are loans or equity.

iii. The Application should be denied due to Proposed Counsel’s potential conflicts of interest due to its concurrent representation

The Application should be denied because Proposed Counsel holds a potential conflict of interest that would disqualify representation of the Debtor. The *Sundance Self Storage* case highlights the risks of concurrent representations of related parties. There, the attorney for the Chapter 11 debtor also represented the debtor’s manager of operations in the latter’s Chapter 13 case, a connection that counsel failed to disclose when he filed his employment application. *See In re Sundance Self Storage-El Dorado LP*, 482 B.R. 613, 628 (Bankr. E.D. Cal. 2012). Apparently, the debtor’s manager depended upon his income from the Chapter 11 debtor to fund his Chapter 13 plan. *Id.* at 628-29. After the Chapter 11 debtor was unable to obtain confirmation of its plan and with its primary asset facing foreclosure, the debtor transferred its real property without bankruptcy court approval. The recipient of this unauthorized transfer was a corporation

1 wholly-owned by the debtor's manager. Shortly thereafter, the corporation filed its own
2 bankruptcy case. *Id.* at 618.

3 Notably, the *Sundance Self Storage* court held that the debtor's counsel had an "interest
4 materially adverse to the interest of the estate" and that he held and represented interests adverse
5 to the estate from the moment the concurrent representation began. *Id.* at 630. At the outset of the
6 case, the conflict may have been a potential conflict. But "it became a classic illustration of the
7 reasons bankruptcy courts should *nip a potential conflict in the bud* rather than await its destructive
8 effects." *Id.* at 629 (emphasis added)

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10 Here, the Application merely states that Proposed Counsel reviewed the Debtor's records,
11 including a list of the creditors and parties in interest, and concluded that Proposed Counsel does
12 not represent any interest adverse to the Debtor or the estate. ECF No. 24, at p. 6. However, when
13 viewed prospectively, Proposed Counsel appears to have several potential conflicts that may ripen
14 into actual conflicts. Notably, the estate may have claims against Mr. Miroyan for potential
15 fraudulent transfers of real property or other estate assets. The estate is entitled to "undivided
16 loyalty" from its professionals, yet presently, the estate risks representation that does not
17 adequately protect the Debtor's interest due to Proposed Counsel's concurrent representation of
18 the Debtor and Mr. Miroyan. *See In re Sundance Self Storage-El Dorado LP*, 482 B.R. at 625.
19 While Proposed Counsel's reply to the Creditors' objection to the Application proposes refunding
20 the retainer paid for the chapter 13 case, Proposed Counsel may be able to remove the potential
21 conflict by (i) ending its representation of Mr. Miroyan, and (ii) complying with applicable
22 provisions of the California Rules of Professional Conduct (including Rule 1.9 "Duties to Former
23 Clients"). *See In re McKinney Ranch Assoc.*, 62 B.R. 249, 256-58 (Bankr. C.D. Cal. 1986)

1 (although counsel could not represent both the debtor and its general partners, he could be
2 appointed prospectively after he substituted out as counsel for general partners); *In re Kobra*
3 *Properties*, 406 B.R. 396, 403-04 (Bankr. E.D. Cal. 2009). By local rule, the Northern District of
4 California has adopted the Rules of Professional Conduct of the State Bar of California as the
5 standards of professional conduct in the district and bankruptcy courts. *See* Bankruptcy Local Rule
6 1001-2.
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8 Based on the foregoing potential conflicts, Proposed Counsel's employment should be
9 denied. While Proposed Counsel's concurrent representation of the Debtor and its related parties
10 may not currently present an actual conflict, the conflict could ripen, just as it did in the *Sundance*
11 *Self Storage* case. The best course is to "nip [the] conflict in the bud" now. *See In re Sundance Self*
12 *Storage-El Dorado LP*, 482 B.R. at 629; *see also In re Kobra Properties*, 406 B.R. at 404 ("When
13 the representation of multiple clients is concurrent, the duties of loyalty and confidentiality
14 combine to make it very difficult to overcome the 'hold' or 'represent' disqualification imposed
15 by §§ 101(14)(C), 327(a), and 327(c).").
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18 IV. CONCLUSION

19 The United States Trustee respectfully requests that the Court sustain her Objection, deny
20 the Application, and grant such other relief as the Court deems warranted under the circumstance.
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22 Dated: May 31, 2022

TRACY HOPE DAVIS
UNITED STATES TRUSTEE

24 By: /s/ Elvina Rofael
Elvina Rofael
Attorney for United States Trustee
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